STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. 13,474

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Appeal of)

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Kevin/Diane Hogan)

INTRODUCTION

The petitioners appeal the decision by the Department of Social and Rehabilitation Services (SRS) finding them ineligible for an ongoing adoption assistance subsidy and for reimbursement of adoption expenses related to their adoption of a child in 1991. The issue is whether the petitioners' child qualifies retroactively for such assistance.

FINDINGS OF FACT

The petitioners' adopted son was born on April 30, 1991. He was placed in the petitioners' home by the Lund Family Center on May 23, 1991. His birth mother voluntarily relinquished him to the Lund Center on June 10, 1991. On June 11, 1991, the Probate Court terminated the birth mother's parental rights.

On December 9, 1991, the Lund Center submitted a final adoption report to the Probate Court. The report indicated that the child had had salmonella poisoning, which had been caught in time by the petitioners and successfully treated. The report indicated that despite a suspicion by the child's doctors of "seizures" the child had a normal EEG and was "friendly, alert, and thriving." The report also indicated that the mother had a history of drug abuse but had reportedly stopped using drugs early in the pregnancy (although she had continued to smoke cigarettes into her eighth month). The Probate Court finalized the petitioners' adoption of the child on January 6, 1992.

At no time was the child ever in SRS custody. This was a private adoption between the petitioners and the Lund Center. The Lund Center is a private adoption agency licensed by SRS. Although children not in SRS custody and placed through private adoption agencies are also eligible for adoption assistance (see infra), at no time during the adoption proceedings were the petitioners aware of the existence of the adoption assistance program.

The evidence establishes, however, that SRS had advised the Lund Center of the existence of the program at least as of June, 1991--more than six months prior to the date the petitioners' adoption of the

child was finalized. Although it appears that SRS waited several years before notifying private adoption agencies in the state of the availability of adoption assistance for private adoptions, it cannot be found that the Lund Center could not or should not have informed the petitioners of the availability of that program in time for the petitioners to have filed a timely application for assistance and for the Probate Court to have made any requisite judicial determinations (see infra) regarding the return of the child to the home of his natural mother.(1) Therefore, it cannot be concluded that SRS is responsible for the petitioners having been unaware of the existence of the adoption assistance program at the time of the adoption.

From the time of his adoption by the petitioners the child cried constantly and had difficulty eating and sleeping, which made caring for him demanding and stressful. Eventually, the petitioners sought the help of a psychiatrist who specializes in biological disorders and learning disabilities. In Spring of 1994, the psychiatrist diagnosed the child as having a "pervasive developmental disability", which is akin to autism. The psychiatrist testified that diagnosing this condition is difficult in infants and is not necessarily linked to the health of the birth mother or her behavior during pregnancy. The psychiatrist also testified, however, that given the birth mother's history of drug abuse, there would have been an increased likelihood of health and developmental problems with the child.

In December, 1994, the petitioners applied to SRS for an on-going adoption assistance subsidy and for the reimbursement of non-recurring expenses related to the adoption of their child in 1991. The Department denied this application, determining that the child did not meet the eligibility criteria at the time of his adoption and that he cannot qualify for this assistance retroactively.

There is no question in this matter that as a result of the child's problems the petitioners are facing a certain future of continued financial expense and emotional stress in meeting the child's medical and developmental needs. The petitioners struck the hearing officer as remarkable for the candor and dignity with which they have pursued this matter. The petitioners admit that whatever the outcome of this matter, they are now committed to raising the child and providing him the best medical, educational, and social resources that are available to them. However, they credibly testified that had they known in advance of the financial and emotional burdens the child's problems would cause, they would not have adopted him. The petitioners represented that they are pursuing legal recourse against the Lund Center for, inter alia, allegedly misrepresenting to them the medical and social history of the child's birth mother.(2)

ORDER

SRS's decision is affirmed.

REASONS

The starting point for the legal analysis in this matter is the federal statute that created the adoption assistance program. 42 U.S.C. § 673 includes the following:

Adoption assistance program

(a) Agreements with adoptive parents of children with special needs; State payments; qualifying children; amount of payments; changes in circumstances; placement period prior to adoption;

nonrecurring adoption expenses

. . .

(2) ... a child meets the requirements of this paragraph if such child--

(A)(i) at the time adoption proceedings were initiated, met the requirements of (AFDC eligibility) or would have met such requirements except for his removal from the home of a relative . . . either pursuant to a voluntary placement agreement with respect to which Federal payments are provided . . . or as a result of a judicial determination to the effect that continuation therein would be contrary to the welfare of such child,

(ii) meets all of the requirements of subchapter XVI of this chapter with respect to eligibility for supplemental security income benefits, or

(iii) is a child whose costs in a foster family home or child care institution are covered by the foster care maintenance payments being made with respect to his or her minor parent . . . .

(B)(i) received aid under the State plan (for AFDC) in or for the month in which such agreement was entered into or court proceedings leading to the removal of such child from the home were initiated, or

(ii)(I) would have received such aid in or for such month if application had been made therefor, or (II) had been living with a relative . . . within six months prior to the month in which such agreement was entered into or such proceedings were initiated, and would have received such aid in or for such month if in such month he had been living with such a relative and application therefor had been made, or

(iii) is a child described in subparagraph (A)(ii) or (A)(iii), and

(C) has been determined by the State, pursuant to subsection (c) of this section, to be a child with special needs.

. . .

(c) Children with special needs

For purposes of this section, a child shall not be considered a child with special needs unless--

(1) the State has determined that the child cannot or should not be returned to the home of his parents; and

(2) the State had first determined (A) that there exists with respect to the child a specific factor or condition (such as his ethnic background, age, membership in a minority or sibling group, or the presence of factors such as medical conditions or physical, mental, or emotional handicaps) because of which it is reasonable to conclude that such child cannot be placed with adoptive parents without providing adoption assistance under this section or medical assistance under subchapter XIX of this chapter, and (B) that, except where it would be against the best interests of the child because of such factors as the existence of significant emotional ties with prospective adoptive parents while in the care

of such parents as foster child, a reasonable, but unsuccessful, effort has been made to place the child with appropriate adoptive parents without providing adoption assistance under this section or medical assistance under subchapter XIX of this chapter.

The above criteria can be summarized as requiring that to be eligible for adoption assistance a child must 1) be either ANFC or SSI eligible at the time the adoption proceedings are initiated; 2) be receiving or eligible for ANFC at the time of the adoption assistance agreement or the court proceedings removing the child from the home; and 3) have "special needs"--i.e., cannot return to live with its parents, have a medical or situational handicap, and because of that handicap cannot be placed for adoption without providing adoption assistance payments.

Federal regulations implementing the above provisions further provide:

The adoption assistance agreement for payments pursuant to section 473(a)(2) must meet the requirements of section 475(3) of the Act and must:

(1) Be signed and in effect at the time of or prior to the final decree of adoption. A copy of the signed agreement must be given to each party . . . .

42 C.F.R. § 1356.40 (b).

The petitioners do not dispute that part of the intent of above provisions is to minimize ANFC payments to children in, or likely to be in, foster care by providing adoption assistance to encourage the permanent adoption of those children. The petitioners maintain, however, that they should be found eligible for an adoption assistance subsidy at this time because it can now be determined retroactively that their child would have met all the above eligibility factors for adoption assistance had they applied for it at the time. Although acknowledging sympathy with the petitioners' situation, SRS maintains that it is not the intent of the program to provide assistance to adopting parents who, after the adoption takes place, are faced with expenses and circumstances they did not understand or anticipate. Reluctantly (because of his own sympathy with the petitioners' predicament), the hearing officer concludes that the evidence and the law in this matter clearly support SRS's decision.

The legal analysis need really go no further than the regulation cited above, 42 C.F.R. § 1356.40 (b)(1), which requires that to be eligible for the adoption assistance program an adoption assistance agreement between SRS and the adopting parents "must...be signed and in effect at the time of or prior to the final decree of adoption".[(3)] There is no question in this matter that the petitioners did not even apply for adoption assistance until more than two years after they had adopted the child.

The petitioners cite an Ohio trial court decision

(Calmer v. Ohio Dept. of Human Services, et al, Case No. 188051 [Court of Common Pleas, 1991]) and two U. S. Dept. of Health and Human Services Policy Interpretation Question (PIQ) Memoranda (Nos. ACYF-PIQ-88-06 [12/2/88] and ACYF-PIQ-92-02 [6/25/92]) in which it was held that the above provision cannot be used to deny eligibility in cases in which the state agency has itself violated the law by not informing the adoptive parents of the existence of the adoption assistance program prior to the adoption. The facts of the instant matter are clearly distinguishable from the cited cases, however. The above-cited cases all involved children who were in state custody prior to their adoption. In this case the

petitioners adopted their child through a private agency (the Lund Center); and, unlike in the cited cases, it cannot be concluded that the state agency (SRS) violated any statutory or regulatory duty to the petitioners herein.(4)

Whether or not the Lund Center may be liable to the petitioners is, of course, an open question. However, the Board has held (and the petitioners herein do not argue otherwise) that the elements of estoppel are not met, and a state agency cannot be estopped, when individual's detrimental reliance is based not on the actions or inactions of the party to be estopped, but rather on the actions or inactions of a third party. Fair Hearing No. 13,029; see also, Stevens v. DSW, 159 Vt 408 (1992).

The above regulation clearly requires that to be eligible for adoption assistance payments an adoption assistance agreement has to be signed and in effect at the time of or prior to the adoption itself. In this case, through no fault of SRS, this simply was not done. Inasmuch as SRS's decision in this matter was in accord with the regulations, the Board is bound by law to affirm it.(5) 3 V.S.A. § 3091(d) and Fair Hearing Rule No. 19.

In light of the above conclusion it is unnecessary for the Board to consider whether the child can retroactively be found to have met the other eligibility provisions in the federal statutes (see supra).(6) Moreover, considering the petitioners' pending action against the Lund Center (which was not a party to this fair hearing), any gratuitous findings or legal conclusions by the Board to this effect might well prejudice one or both of the parties to that action, as well as influence any position SRS, as a potential witness in that case, might take. The findings sought by the petitioners would also require ex post facto judgements as to the character and circumstances of the birth mother, who also was not a party to this fair hearing. See 42 U.S.C. §§ 673(a)(2)(A)(i) and (c)(1), supra. The latter consideration is further legal argument and compelling policy justification for the requirement of a signed adoption assistance agreement prior to the actual adoption. Indeed, as pointed out by SRS, it has been held that a nunc pro tunc determination regarding a birth mother's circumstances, even by a court that had original jurisdiction to make them, is insufficient to meet the requirements of the statute that such determinations must be made at the time of the actual adoption. Harvey v. Shalala, 824 F. Supp. 186 (D.Neb. 1993). For these reasons, the Board deems it inappropriate and unnecessary to render any further findings and conclusions in this matter.

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1. Nobody from the Lund Center testified at the hearing.

2. It should also be noted that the petitioners' attorneys have put forth a thorough and diligent effort in the petitioners' behalf. In this complicated case of first impression to the Board, they and SRS are to be commended for the clear and non-confrontational manner in which they have presented the facts and the legal issues.

3. The petitioners have argued that the Board should not consider this basis of denying their claim because SRS did not raise it until the time of this appeal. However, it is concluded that the proper "cure" for this alleged procedural defect would be to allow the petitioners additional time to respond--not to preclude SRS from ever raising it. The petitioners do not allege any prejudice in terms of their ability to respond to this argument, and, in fact, addressed it in detail in their reply memorandum.

4. Considering all the cases cited by the parties, the Board disagrees with the petitioners' argument that any precedence exists specifically holding that the requirements of 42 C.F.R. § 1356.40(b)(1) do not apply in cases in which a third party--not the state agency--is at fault in the parents' failure to have filed a timely application for assistance. If at any time the petitioners' herein obtain an opinion from the federal agency that contradicts the Board's holding in this matter they can (and should) petition the Department and, if necessary, the Board to reconsider this decision.

5. After the record had closed in this matter the petitioners submitted an Ohio administrative hearing decision that appears to allow for retroactive consideration of adoption assistance eligibility factors. That decision, however, does not even address, much less consider the effect of, 42 C.F.R. § 1356.40 (b)(1), supra; and there is no indication whether the hearing officer in that case was subject to the same statutory constraints as the Vermont Human Services Board in reviewing a decision by a state agency. Therefore, that decision is deemed to have little, if any, bearing on the instant case.

6. Suffice it to say that based on the evidence presented, the petitioners would have an uphill battle in that regard. For example, there was essentially-unrebutted testimony from the SRS "adoption coordinator" that because of the high demand for infant adoptions, even if the child's severe medical problems had been known at the time of his adoption, other adoptive parents could have readily been found without an adoption subsidy. See 42 U.S.C. § 673(c)(2), supra.